senting, that the legislative declaration is subject to judicial review. *State ex rel. Pollock* v. *Becker* (Mo. 1921) 233 S. W. 641.

Some jurisdictions hold that a legislative determination that a law is a necessary emergency measure is subject to judicial review. *State ex rel. Brislawn* v. *Meath* (1915) 84 Wash. 302, 147 Pac. 11; see *State ex rel. Westhues* v. *Sullivan* (1920) 283 Mo. 547, 576, 224 S. W. 327. Others declare the legislative finding conclusive. *Kadderly* v. *Portland* (1903) 44 Ore. 118, 74 Pac. 710; *State ex rel. Larin* v. *Bacon* 14 S. Dak. 394, 85 N. W. 605. Should the courts review acts of a coördinate department of government done in the exercise of a discretionary power vested in it by the constitution? The executive determination of the existence of an emergency which necessitates the calling out of the militia is conclusive. *Martin* v. *Mott* (U. S. 1827) 12 Wheat. 19. The recognition of a foreign government being discretionary with the executive department is not subject to judicial review. *Oetjen* v. *Central Leather Co.* (1918) 246 U. S. 297, 38 Sup. Ct. 309. The propriety of legislation under the "elastic" clause being discretionary with Congress is not judicially reviewable. *First National Bank* v. *Union Trust Co.* (1917) 244 U. S. 416, 37 Sup. Ct. 734. However, where the legislature is given discretion under the police power, the courts will look into the substance of the matter to see if the legislature has transcended its constitutional authority. See *Mugler* v. *Kansas* (1887) 123 U. S. 623, 661, 8 Sup. Ct. 273. It has been said that to allow the legislature to be the sole judge as to the existence of an emergency could render the referendum nugatory. See *State ex rel. Westhues* v. *Sullivan, supra,* 586. It seems that the court would reach a sounder conclusion both in governmental theory and as a matter of practical policy in refusing to review the legislature's exercise of discretionary powers. For the courts to reverse a finding of fact by a coördinate body of government appears a usurpation of power. Moreover, the legislature being more closely in touch with political situations should be better able to decide whether an emergency exists.

CONSTITUTIONAL LAW—TAXATION OF STOCK EXCHANGE SEAT—JURISDICTION.—The plaintiff, who was domiciled in Ohio, was the owner of a seat on the New York Stock Exchange. Ohio imposed a property tax upon it. *Held,* Justices Holmes, Van DeVanter, and McReynolds, dissenting, the tax is valid. *Anderson* v. *Durr* (1921) 42 Sup. Ct. 15.

Membership in an exchange, notwithstanding limitations upon its use, is property, and subject to taxation. *Rogers* v. *Hennepin County* (1916) 240 U. S. 184, 36 Sup. Ct. 265; *State* v. *McPhail* (1914) 124 Minn. 398, 145 N. W. 108; *contra, San Francisco* v. *Anderson* (1894) 103 Cal. 69, 36 Pac. 1034. Nothing in the federal Constitution prevents its taxation. *Rogers* v. *Hennepin County, supra.* But unlike ordinary property it cannot be reached by levy or attachment. *Pancoast* v. *Gowen* (1879) 93 Pa. St. 66. However, it passes to the trustee in bankruptcy. *Page* v. *Edmunds* (1903) 187 U. S. 596, 23 Sup. Ct. 200. Whether it is included among the property to be taxed under the state statutes, is a matter of local law. *Rogers* v. *Hennepin County, supra.* Assuming that a "seat" is property, the next question would be the situs for taxation. A state cannot tax the tangible property of its citizens when it is permanently located in another jurisdiction. *Union Transit Co.* v. *Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36. But it can tax tangible property which though physically outside the owner's domicile, has not acquired a situs for taxation elsewhere. *Southern Pacific Co.* v. *Kentucky* (1911) 222 U. S. 63, 32 Sup. Ct. 13. Intangible propery is taxable at the domicile of the owner. *Hawley* v. *Malden* (1914) 232 U. S. 1, 34 Sup. Ct. 201. This is true even though it is also taxable in another state by virtue of having acquired a busines situs there. *Columbia Trust Co.* v. *Louisville* (1917)

245 U. S. 54, 38 Sup. Ct. 40. As the Supreme Court has refused to apply the same rule to intangible property that is applied to tangible property, the decision in the instant case is sound.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE BY PLAINTIFF.—The plaintiff, a driver, sued to recover the compensation stipulated in a contract with a school district for the transportation of teachers and pupils to and from school for a period during which school was closed by order of the State Board of Health because of an epidemic. The case was tried and submitted upon the theory that the driver was entitled to recover, if at all, the stipulated compensation as upon performance. *Held,* two justices dissenting, for the defendant. *Sandry* v. *Brooklyn School Dist. No.* 78 (N. Dak. 1921) 182 N. W. 689.

Since there was no actual performance in the instant case, there could be no recovery in *indebitatus assumpsit* for work, labor and services as upon a performance. But in every contract there is a promise implied not to do anything to prevent the other party from performing and for breach of this promise damages may be recovered. *Patterson* v. *Meyerhoffer* (1912) 204 N. Y. 96, 97 N. E. 472. Such damages are measured by the contract rate less what the plaintiff might have earned elsewhere had he sought similar employment with reasonable diligence. *Howard* v. *Daly* (1875) 61 N. Y. 362. Here, the plaintiff's performance became impossible because of the defendant's act in closing the schools, and the question arises whether, if the suit had been tried on the proper theory, there might have been a recovery. It has been held that no deduction can be made from a teacher's salary where a school is closed during the term on account of an epidemic. *Gear* v. *Gray* (1894) 10 Ind. 428, 37 N. E. 1059. But most of these cases go on the ground that the teacher has been required by the school to hold herself in readiness to teach. *Libby* v. *Inhabitants of Douglas* (1900) 175 Mass. 128, 55 N. E. 808. The teacher has in some cases, however, been denied recovery. *School Dist. No.* 16 *of Sherman County* v. *Howard* (1904) 5 Neb. 340, 98 N. W. 666. And this seems in accord with the generally accepted rule that where the performance of a promise becomes impossible because of a change in the domestic law or by order of the executive, the performance is excused. *Miller* v. *Taylor* [1916] 1 K. B. 402 (*semble*). This rule would preclude a recovery in the instant case for breach of the implied promise.

CRIMINAL LAW—BURGLARY—INDICTMENT—VARIANCE.—In an indictment for burglary, ownership and possession were laid in S the owner of the store. S had been injured and E, a clerk, had assumed complete control of the business. *Held,* a variance. Possession should have been laid in E. *Ratcliff* v. *State* (Tex. 1921) 229 S. W. 857.

To constitute a good indictment for larceny the thing stolen must be charged to be the property of the actual owner, or of a person having a special property interest. *The People* v. *Bennett* (1867) 37 N. Y. 117. The existence of a special property interest in a bailee does not prevent the allegation of property in the general owner. *Barnes* v. *The People* (1856) 18 Ill. 52. In an indictment for larceny from an agent, an allegation of property in either the real owner or the agent, is sufficient. *Lowry* v. *State* (1904) 113 Tenn. 220, 81 S. W. 373; *Commonwealth* v. *Blanchette* (1892) 157 Mass. 486, 32 N. E. 658. It is insufficient, however, to charge it to be the property of a mere servant. *State* v. *Jenkins* (1878) 78 N. C. 478. The relation of master and servant exists whenever the employer retains the right to direct "not only what shall be done, but how it shall be done." See *Singer Mfg. Co.* v. *Rahn* (1889) 132 U. S. 518, 523, 10 Sup. Ct. 175. As a servant has mere custody of goods which he has received from his